MOWREY
MEEZAN
CODDINGTON
CLOUD
LLP

Douglas E. Cloud
Direct Dial: (404) 969-0736
Email: doug.cloud@m2c2law.com

March 15, 2012

VIA ELECTRONIC AND FIRST CLASS MAIL

Thomas C. Nash
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Re: West Vermont Drinking Water Site, Speedway, Indiana, Site ID # B5UJ (the "West Vermont Site" or "Site")

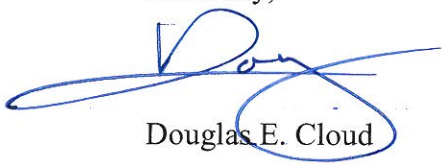
Dear Mr. Nash:

As you know, this firm represents the Genuine Parts Company ("GPC") in connection with the subject West Vermont Site. We are providing the attached summary information for your consideration in connection with the recent investigation performed by representatives of U.S.EPA (results pending).

The attached summary provides support for and is consistent with the prior General Notice Letter to AIMCO identifying it as a PRP for the Site. Your office is likely already aware of the facts described and Indiana federal district court decisions cited, but we thought that the attached summary might still be helpful. The factual background information was provided in large part by GPC's consultant, Environ, based upon review of publicly available information from the Indiana Department of Environmental Management.

Please let me know if you have questions or would like to discuss any of the information in the attached summary.

Sincerely,



Douglas E. Cloud

cc: David M. Meezan

ATTACHMENT

FACTUAL BACKGROUND

As reported in prior submittals to the Indiana Department of Environmental Management ("IDEM") by Mundell & Associates, Inc. ("Mundell") on behalf of AIMCO Michigan Meadows Holdings, LLC ("AIMCO MMH"), at least two rounds of CAP18™ or CAP 18ME™ bioremediation injections have been completed at the Michigan Plaza property. The first round of injections occurred from August 1 to September 4, 2007. Approximately 47,000 pounds of CAP18™ were injected in three source areas. Following the first round of CAP18™ injections, vinyl chloride concentrations in groundwater increased by up to 6,500 times. AIMCO MMH was the owner of the Michigan Plaza property at the time of the 2007 injections.

On May 8, 2008, AIMCO MMH recorded the transfer of all or part of its interest in the Michigan Plaza property to AIMCO Michigan Apartments LLC ("AIMCO MA").[1] On October 20, 2008, AIMCO MA appears to have recorded the transfer of its interest in the Michigan Plaza property to GENNX Properties VI LLC and GENNX Properties VII LLC.

AIMCO continued to perform bioremediation injections at the Michigan Plaza property. A second round of injections was performed from February 4 to 12, 2009, this time with CAP18 ME™. Approximately 16,575 pounds of CAP 18ME™ was injected in three source areas. Following the second round of injections, vinyl chloride concentrations in groundwater increased by up to 4,480 times over pre-injection (August 2007) concentrations. A third round of injections was planned by Mundell for August 2011, but it is unclear if it has yet been performed.

All of the bioremediation injections were or are being performed at the direction and under the control of AIMCO, although neither the 2007 nor 2009 injections appear to have been performed pursuant to a remediation work plan approved in writing by IDEM. One of the intentional effects of the bioremediation injections by AIMCO was to break down tetrachloroethylene ("PCE") into daughter products, including large quantities of vinyl chloride. As previously stated by IDEM, "[w]hile the Michigan Plaza release initially contained primarily PCE, the aggressive bioremediation effort has increased vinyl chloride concentrations over 1000 times in some locations and has changed the equilibrium of the aquifer."[2] As discussed below, as the owner and operator of a site where vinyl chloride was disposed of and/or otherwise came to be located, and as a generator of the vinyl chloride, AIMCO is a liable party pursuant to CERCLA § 107(a).

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1 AIMCO MMH and AIMCO MA are individually and collectively referred to herein as "AIMCO".
2 January 22, 2010 letter from Erin Brittain and Richard Harris, IDEM.

AIMCO is Liable as an Operator Pursuant to CERCLA § 107(a)(2)

CERCLA § 107(a)(2) imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." CERCLA defines an "operator" as "any person . . . operating" a facility. 42 U.S.C. § 9601(20)(A)(ii). And, as the U.S. Supreme Court articulated in *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998), "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."

Indiana federal district court decisions – including a decision of the Indianapolis Division of the Southern District of Indiana – make clear that AIMCO's CAP18™ and CAP 18ME™ bioremediation activities gave rise to CERCLA "operator" liability at the West Vermont Drinking Water Site (the "West Vermont Site" or "Site") because such activities disposed of vinyl chloride and other tetrachloroethylene (PCE) breakdown products at the Site.

In *RSR Corp. v. Avanti Dev., Inc.*, Case No. IP-95-1359, 2000 U.S. Dist. LEXIS 14210 (S.D. Ind. Mar. 31, 2000), the Indianapolis Division of the Southern District of Indiana addressed whether a party that exacerbated contamination at a property when performing cleanup activities could be held liable under CERCLA § 107(a)(2) as an operator. There, RSR Corporation allegedly exacerbated pre-existing lead contamination at the Avanti Superfund Site when performing cleanup activities to make the site marketable for sale. *See id.* at *25. The court noted that "the meaning of operation is much broader than just the operation of a . . . manufacturing plant." *Id.* at *30. Relying on *Bestfoods*' definition of an "operator," the court held that "because RSR directed the workings of, or managed, the cleanup activities at 'a site or area where a hazardous substance [had] been deposited,' at a time when the hazardous substance was disposed of," it could be held liable as an "operator" pursuant to CERCLA § 107(a)(2). *Id.* at *31 (quoting 42 U.S.C. § 9601(9)).

The *RSR* court cited with approval the Northern District of Illinois' decision in *Ganton Technologies, Inc. v. Quadion Corp.*, 834 F. Supp. 1018, (N.D. Ill. 1993). There, the court considered whether CERCLA operator liability could attach to remediation contractors whose activities allegedly exacerbated PCB contamination at a site by contaminating previously uncontaminated areas. *See id.* at 1021. The court concluded that such parties could be held liable under CERCLA § 107(a)(2). First, the remediation contractors allegedly "controlled the activities in which the additional contamination took

place – the clean up operations." *Id.* at 1022. Second, the court found that exacerbating the preexisting PCB contamination at the site constituted "disposal" for purposes of CERCLA because "'disposal' is not limited to the initial introduction of contaminants into a site." *Id.* (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993)).

Most recently, in *City of Gary, Indiana v. Shafer*, 683 F. Supp. 2d 836, 857-58 (N.D. Ind. 2010), the Northern District of Indiana found a party that had moved lead-contaminated soil when grading and leveling a site liable as a CERCLA operator. The court explained that such movement constituted "disposal" under CERCLA because the statute defines the term to include "dispersion of a hazardous substance which exacerbates a pre-existing contamination on [a] property." *Id.* at 857. "Disposal is not limited to the initial introduction of contaminants into a site. Rather, whether a particular action constitutes disposal can depend on the context of the entire situation." *Id.* (internal quotation marks omitted).

The foregoing decisions of district courts in the Seventh Circuit extending CERCLA operator liability to persons who exacerbate existing contamination are in accord with decisions in other federal circuits. *See, e.g., Kaiser Aluminum & Chem. Co. v. Catellus*, 976 F.2d 1338, 1341-43 (9th Cir. 1992) (party whose excavation activities spread contaminated soil onto uncontaminated areas of a site could be held liable under CERCLA § 107(a)(2); *Tanglewood East Homeowners v. Thomas*, 849 F.2d 1568, 1573 (5th Cir. 1988) (CERCLA's definition of "disposal" does not limit disposal to a one-time occurrence); *KFD Enter., Inc. v. City of Eureka*, Case No. C-08-4571, 2010 U.S. Dist. LEXIS 125135, at *11- 17 (N.D. Cal. Nov. 12, 2010) (remediation contractor could be held liable under CERCLA § 107(a)(2) for activities that allegedly caused contamination to flow from upper groundwater zone to lower groundwater zone).

AIMCO's bioremediation activities disposed of vinyl chloride and other PCE breakdown products at the West Vermont Site and are substantively no different than the activities that gave rise to CERCLA "operator" liability in the *RSR Corp.*, *Ganton Technologies*, and *City of Gary* decisions. As stated in its February 28, 2008 Remediation Work Plan, AIMCO performed in-situ bioremediation using CAP18™ and CAP 18ME™ injections to drive the aquifer to an anaerobic condition and "stimulate anaerobic bioremediation of chlorinated hydrocarbons via a reductive dechlorination pathway." *Id.* at 21. AIMCO's injections in fact resulted in the anaerobic bioremediation of PCE in the aquifer and, as a result, conditions in the subsurface of the West Vermont Site were exacerbated by the resulting contamination of vinyl chloride and other PCE breakdown products. Consequently, EPA should consider AIMCO a responsible party at the West Vermont Site and should demand AIMCO's participation in any administrative actions taken by the agency.

AIMCO is Liable as a Current Owner Pursuant to CERCLA § 107(a)(1)

The foregoing analysis also makes clear that AIMCO's disposal of vinyl chloride at the Michigan Plaza Site gives rise to "owner" liability pursuant to CERCLA § 107(a)(1), which imposes such liability on "the owner and operator of a vessel or a facility." CERCLA defines a "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B). As described above, vinyl chloride was disposed of and/or came to be located at the Michigan Plaza Site as a result of AIMCO's 2007 CAP18™ bioremediation injections which occurred while AIMCO was still an owner of the Michigan Plaza property.

AIMCO is Liable as an Arranger Pursuant to CERCLA § 107(a)(3)

As the court in *RSR Corp.* noted, the contamination-exacerbating activities that give rise to operator liability also arguably give rise to arranger liability under CERCLA § 107(a)(3). *See RSR Corp.*, 2000 U.S. Dist. LEXIS 14210, at *25 n. 6. That logic applies with equal force to AIMCO's activities at the Michigan Plaza and West Vermont Sites.

CERCLA § 107(a)(3) imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." In *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1879 (2009), the U.S. Supreme Court explained that, "under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance."

Here, there is no doubt that AIMCO took intentional steps to dispose of vinyl chloride and other PCE breakdown products at the West Vermont Site. First, as discussed above, AIMCO's bioremediation activities constitute the "disposal" of vinyl chloride and other PCE breakdown products at the West Vermont Site. *See City of Gary*, 683 F. Supp. 2d at 857 ("disposal" includes the "dispersion of a hazardous substance which exacerbates a pre-existing contamination on [a] property"). Second, such disposal was intended: AIMCO's stated intent was to use CAP18™ and CAP 18ME™ bioremediation to stimulate anaerobic bioremediation of PCE in the aquifer beneath the West Vermont Site – *i.e.*, to generate vinyl chloride and other PCE breakdown products. *See* Remediation Work Plan, at 21 (Feb. 28, 2008). Consequently, EPA should also consider AIMCO an "arranger" at the West Vermont Site pursuant to CERCLA § 107(a)(3).